Office Supreme Court
FILED
JAN 11 19
JAMES D. MA

In Equity, Nos. 493 and 494

In the Supreme Court of the United States.

October Term, 1914.

THE UNITED STATES,

Appellant,

vs.

ERIE RAILROAD COMPANY,

Appellee.

Appeals from the District Court of the United States for the Southern District of New York.

REPLY BRIEF FOR ERIE RAILROAD COMPANY.

GEO. F. BROWNELL,
M. B. PIERCE,
Solicitors for Appellee.

In the Supreme Court of the United States

OCTOBER TERM, 1914.

THE UNITED STATES, Appellant, *vs.* ERIE RAILROAD COMPANY, Appellee.	In Equity No. 493
THE UNITED STATES, Appellant, *vs.* ERIE RAILROAD COMPANY, Appellee.	In Equity No. 494

REPLY BRIEF FOR ERIE RAILROAD COMPANY.

(The italics are ours throughout.)

I.

The reply brief filed for the United States indicates that appellant's counsel have fallen into the error of as-

suming that our contention is that "because, *abstractly* considered, the words 'common carriers' and 'railroad companies' are unambiguous, therefore they must also be unambiguous when used in the exception to the Anti-Pass Provision in association with other words and with reference to a particular object." Appellee has not based its claim with respect to the proper construction of these provisions of the Act upon any such contention as is ascribed to it by counsel for the Government. On the contrary, it has been and is "the contention of this appellee that the phrase 'common carriers' *as used in this proviso* means what it says, and is not limited to 'common carriers subject to the Act.'" (Brief, p. 21.)

Appellee's contention, as stated in our Points 1 and 2 (Brief, pp. 17-45), is that the language of the provisos in question, in sections 1 and 22 of the Act, *as used therein,* is unambiguous and that when these provisos are read by themselves, and when read in connection with the other provisions of those sections, and when read in connection with the entire Act, the terms "common carriers" and "other railroad companies" as used therein, under the rules of construction ordinarily applied by the Courts, and applied by the Court below in these cases, mean what they say and are not limited to common carriers and railroad companies "subject to the Act," and that the clear and unambiguous language so used authorizes the continuance of the well-known custom and practice of interchange which has existed ever since long before the passage of the Act.

On page 3 of appellant's reply brief it is stated that

appellee contends at pages 44 to 46 of its brief that the words "railroad companies," as those words are used in section 22 "include trans-Atlantic steamship companies," and that such ascribed contention is inconsistent with appellee's claim that the term "railroad companies" as used therein is unambiguous. By referring to appellee's brief it will be seen that no such suggestion has been made by appellee with respect to the meaning of the term "railroad companies." On the contrary, our claim (p. 45) is that the various provisions of section 22 as construed by this Court are rather illustrative than exclusive, and that therefore, under and in view of the provisions of that section which prescribe that nothing in the Act shall be construed to prevent the transportation at free or reduced rates of various descriptions of persons and property, or construed to prohibit the continuance of various other practices, etc., railroad companies subject to the Act lawfully could and did interchange passes with other common carriers not subject to the Act, including trans-Atlantic steamship companies. It was not contended that the term "*railroad companies*" as used in that section *included* such carriers by water, but that in view of the illustrative character of the provisions of that section, the interchanging of passes with such carriers by water was not an unjust discrimination or an undue preference, or otherwise in violation of the prohibitions of the Act.

II.

The contention of counsel for the Government, as emphasized by their reply brief, seems to be that the issuing of the passes in question should be found to be in violation of the Act and enjoined by the Court, not upon the ground that the provisions of the Act as they would be construed under the rules of construction ordinarily applied by courts, and as they have been construed by the court below, prohibit the issuing of the same; but upon the grounds (1) that the provisos in sections 1 and 22 have been construed by the Commission so as to restrict and limit their ordinary meaning and application, (2) that "the Commission's construction is *not plainly erroneous*" (Government's Brief, p. 18), and (3) that inasmuch as Congress has since then amended the Act without changing the provisions so construed by the Commission, "such administrative construction of the Commission must be taken as *impliedly ratified by Congress*, and therefore as *binding upon the courts*" (Government's brief, p. 12). In appellant's reply brief it is urged (p. 6) that there is particular reason for giving this controlling effect to Administrative Rulings of the Commission upon the ground that the Commission "has received *express authority* to *enforce the law* by *orders, regulations and rulings*"; that if railroads should obtain the impression that the Courts will not support effectively the Commission's authority by "respecting" the rulings of the Commission, they will not unquestioningly *obey* them, and that such a condition of affairs would seriously impair the authority of the Commission (pp. 7-9). It

must be assumed that in ascribing this force and effect to regulations and rulings of the Commission, counsel for the Government had reference to the Administrative Rulings upon which they rely in this case in support of their construction of the Act. If this contention were to be maintained it would seem to make the Administrative Rulings of the Commission the supreme law and Administrative *fiat* would take the place of provisions of law as enacted by the legislature and construed by the courts; but no such power has been, or was intended or attempted to be, conferred upon the Commission by the terms of the Act. The contention is as groundless as the baseless fabric of a dream. It is true that the Act (Sec. 12) authorizes and requires the Commission to execute and enforce its provisions but it is not authorized to enforce the law by Administrative Rulings such as these relating to its construction of the meaning and legal effect of sections 1 and 22 of the Act.

By section 6 carriers are required to publish and file schedules showing, among other things, their charges and "any rules or regulations" which affect the same. When complaint is made, or without complaint upon its own motion, the Commission is authorized to consider the propriety of any such charges, "rules or regulations," and if after full hearing they are found to be unjust or unreasonable, etc., the Commission is authorized to determine and prescribe what will be the just and reasonable charge, rules or regulations to be thereafter followed, and to make an order, which must be duly served upon the carrier, requiring it to conform to the rule or regulation so prescribed (Secs. 6, 12-15). But the rules and regulations which the Commission is authorized in cer-

tain cases to prescribe are very different from the so-called "rulings" here under consideration. The latter are merely informal expressions of opinion announced by the Commission from time to time in response to inquiries, or on its own initiative. The Commission at considerable intervals has issued bulletins containing these Conference Rulings made since about 1906. The last complete bulletin issued under date of April 1, 1913, contains about 400 of such informal, *ex parte,* Administrative Rulings. In the "explanatory note" to this bulletin the Commission states that "they are issued for the information of shippers and carriers and others interested in transportation matters. *They express the views of the Commission on informal inquiries involving special facts or requiring interpretation or construction of the law.* * * * It will be observed that some rulings, in the light of a wider knowledge of the subjects involved, have been overruled, while others have been modified or withdrawn."

The Act to Regulate Commerce carefully defines the orders which the Commission is empowered to make, the procedure which must be followed in connection therewith, and the manner in which the same shall be enforced. It is authorized to make orders in proceedings instituted upon formal complaint, or by the Commission on its own motion, and after full hearing. The Commission is authorized and required to enforce the provisions of the Act and its orders lawfully made pursuant to the Act, by informing the Attorney General and District Attorneys of the United States of any violation, and requesting them to institute in the proper Court and prosecute all necessary proceedings for the

enforcement of the Act and of such lawful orders (Secs. 12, 16, 20; Elkins Act, Sec. 3).

Whenever a proceeding of inquiry is instituted by the Commission upon complaint or upon its own motion pursuant to the provisions of the Act (Secs. 12 to 15) it is the duty of the Commission to make its report in writing together with its decision, order or requirement, which reports are entered of record and copies furnished to complainant or any common carrier complained of. The Commission is authorized (Sec. 14) to provide for the publication of these reports and decisions, and such authorized publications are made competent evidence of the reports and decisions therein contained.

The informal expressions of views, or *ex parte* Administrative Rulings, contained in the "Conference Rulings" of the Commission are not orders, regulations or rulings of the Commission provided for by the Act, and such Conference Rulings have no legal status.

The Commission is not authorized to enforce the law by such Adminstrative Rulings, and the carriers are under no obligation to obey such Administrative Rulings if and when the same are brought to their knowledge. It is the provisions of the Act which the carriers are required to obey and the Commission to execute. The law prescribes severe penalties for violation of such provisions, but not for failure to obey the Administrative Rulings of the Commission or its *ex parte* informal views construing the Act. It is the duty and the desire of appellee and other railroad companies to obey the law, but it is their understanding that the law is to be found in the enactments of Congress, as construed by

the Federal Courts, and that while in a general sense all concerned, including administrative officials, carriers, shippers and counsel, are presumed to know the law, yet that, however enlightening and helpful such expressions of opinion or Administrative Rulings may be, they are not the law.

It must be clear that counsel for the Government are in error in their understanding (reply brief, pp. 8, 9) that appellee or other carriers could have filed a suit in equity or maintained other proceedings to test the correctness of the views so expressed by the Commission as to the construction of sections 1 and 22 of the Act, or to test the correctness of any one of the hundreds of other expressions of opinion contained in their Conference Rulings announced from time to time.

It requires no argument to show that the Interstate Commerce Commission must issue *an order*, as distinguished from announcing its opinion by a Conference Ruling, before the parties affected can appeal to the courts for relief. Common carriers subject to the Act to Regulate Commerce cannot review in the courts mere expressions of opinion—Administrative Rulings—not accompanied by orders directed to them. This appellee, we submit, could not have filed a suit in equity to enjoin the enforcement of the Commission's Conference Rulings referred to on page 9 of the Government's reply brief, nor, we submit, are those rulings "General Orders addressed to all carriers" as suggested by appellant.

Appellee had the right to rely and act upon the construction placed upon the statute by it and other railroad carriers generally. If the Commission thought that in so doing the carriers violated the provisions of the

Act the Commission had the right, and it was its duty (1) to make such an order that the carriers could secure a construction of the law by the courts, or (2) to take the steps provided by the Act to test the correctness of its construction of the provisions in question. The fact that the Commission did not take any such action for some years after the making of these Administrative Rulings should not be held to make the opinions so expressed by the Commission binding upon the courts, or to change the rules of construction to be applied by the courts from those that would have been applied had the Commission acted more promptly.

The case of *Kansas City Southern Ry. Co.* vs. *United States,* 231 U. S., 423, was brought to *restrain the enforcement of an order duly made by the Commission* pursuant to the provisions of section 20 of the Act *prescribing a form of accounts, which order was duly served upon the carrier,* and for failure to comply with which the carrier would be subject to the heavy penalty imposed by the Act.

In the Government's reply brief, it is contended that the Administrative Ruling made by the Commission in the Parmelee Company case (12 I. C. C., 40) was not *ex parte,* but that there was a fuller hearing given to the Parmelee Company than is usually the case in administrative proceedings and that any railroad company interested in the Parmelee Company's application would have been heard.

The Administrative Ruling of the Commission in that case seems to have differed from the other Administrative Rulings cited by the Government only because of its having received somewhat more formal consideration.

It appears from the opinion of the Commission, which is included with the published decisions of the Commission (12 I. C. C., 40), that the Parmelee Company was a local transfer company which, by means of omnibuses and wagons, carried passengers and baggage between railroad stations and hotels and private residences in Chicago. It claimed that it was a common carrier subject to the provisions of the Act to Regulate Commerce and, therefore, within the operation of the provisions of that Act regulating the issuing by common carriers subject to the Act of passes in interchange with other common carriers. It filed (p. 40) a brief in support of that contention. The Commission in its opinion, entitled "In the Matter of the Right of Railroad Companies to Exchange Free Transportation *with Local Transfer and Baggage Express Companies*," expressed the opinion that this local transfer company was not a common carrier subject to the Act, and that it could not lawfully receive passes from railroad companies subject to the Act. It does not appear that counsel for the Transfer Company argued the question involved in these cases as to the right of railroad companies subject to the Act to interchange transportation with common carriers by rail or by water, or other common carriers not subject to the Act; but, in any event, there was no hearing or opportunity to be heard by any railroad company or other carrier subject to the Act upon the question of the right of such carriers to issue transportation to carriers not so subject. The official report does not show that any notice of the proceeding before the Commission was given to any common carrier subject to the Act. While they probably "would have been gladly heard," it does not

appear that they were even given notice that there was such a proceeding pending. The opinion was merely an Administrative Ruling in a proceeding in which no order could be made. As no *order* was made, the decision could not be reviewed by appellee or any other carrier, or even by the Parmelee Company itself.

If the statement on page 4 of the Government's reply brief that "the view adverse to that adopted by the Commission *was fully presented*" means that the view adopted by the Commission with respect to these cases was fully presented in the Parmelee case, we respectfully submit that the official report of the case hardly shows such to be the fact.

III.

In appellant's reply brief reference is made (pp. 9 and 10) to section (a) of the Commission's Conference Ruling No. 95 of June 30, 1908, as indicating that the Commission, notwithstanding what was said in section (g) of that Ruling, had made the right of the carrier to issue passes to another carrier to depend upon whether such other carrier is or is not subject to the Act; but by reference to section (g) of Ruling No. 95 it will clearly appear that under the construction given to the Act by the Commission, the right of a carrier to receive such transportation from a carrier subject to the Act is made to depend upon whether such former company has filed with the Commission one or more tariffs of any kind,

either joint or local, *and acknowledged itself subject to the Commission's jurisdiction.*

Our contention as to this construction placed upon this section of the Act by the Commission, finds further support in its Conference Ruling No. 434 of July 23, 1913, that:

> "Free interstate transportation may lawfully be issued to officials of any railroad in an adjacent foreign country which has filed with this Commission joint tariffs and concurrences in connection with interstate carriers in the United States *without reservation as to the Commission's jurisdiction.*"

While prior to the amendment of 1906 there was no express prohibition in the Act against the issuing of passes, yet the Commission contended that sections 2 and 3 of the Act, prohibiting unjust discrimininations and undue preferences, made it unlawful for carriers subject to the Act to issue passes except in those cases covered by the provisions of section 22 (see In the Matter of the Carriage of Persons Free or at Reduced Rates, by the Boston & Maine Railroad Company, 5 I. C. C., p. 69; *Slater* vs. *N. P. Ry. Co.*, 2 I. C. C., p. 243, and other cases cited on page 2 of Government's main brief), and for over twenty years after the enactment of section 22, providing that nothing in the Act should be construed to "prevent the exchange of passes with other railroad companies," the Commission took no step, even through an *ex parte* Administrative Ruling, to make or enforce a construction of the provision which would limit it to the issuing of passes to railroad companies "subject to the Act."

If, when Congress came to enact the amendment of 1906, it intended that the words "other railroad companies" as used in section 22 of the Act should thereafter be given a more restricted meaning than had been applied to them for over twenty years, and that they should thereafter be construed as limited in their application to other railroad companies "subject to the Act," it would seem that it would have used appropriate language to evidence such an intent—particularly in view of the fact that it took pains to indicate by the use of the words "subject to the Act," or other apt form of expression, whenever such a restricted meaning was intended, and there could otherwise be any doubt as to the meaning.

GEO. F. BROWNELL,
M. B. PIERCE,
Solicitors for Appellee.